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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE
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12 UNITED STATES OF AMERICA

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14 Plaintiff,

15 v.

16 CHARLES GLENN PERKINS,

17 Defendant.
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CASE NO. CR13-96 RSM

ORDER DENYING DEFENDANT'S
MOTION TO SUPPRESS

20 **Introduction**

21 Charles Glenn Perkins was charged on March 27, 2013 via a two count Indictment with Receipt
22 of Child Pornography, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1) (Count 1), and Possession of
23 Child Pornography, in violation of 18 U.S.C. § 2252(a)(4) (B) and (b)(2) (Count 2). The Indictment
24 included the Special Allegation that the defendant had previously been convicted of First Degree Incest
25 and Child Molestation in the First Degree. The defendant filed a Motion to Suppress or in the
26 Alternative for a *Franks* Hearing. Dkt #21. Following oral argument, that motion was denied in its
27 entirety. The defendant then entered a plea of guilty to Count 1 pursuant to a conditional plea
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1 agreement which allowed him to appeal the Court's denial of his motion to suppress evidence. On July
2 25, 2014, the Court of Appeals, in an unpublished memorandum disposition, concluded that the district
3 court erred by not granting a *Franks* hearing and remanded for further proceedings. The Court of
4 Appeals did not reach the defendant's motion to suppress. On November 13, 2014, this Court conducted
5 a *Franks* hearing at which the only witness called by either party was the affiant to the search warrant,
6 Special Agent Timothy Ensley with the Department of Homeland Security. Following oral argument
7 the Court granted the parties request to submit further briefing. The Court now having reviewed the
8 pleadings, records and files herein, and being fully advised, finds that the defendant has failed to meet
9 his burden to show that Agent Ensley either intentionally or recklessly omitted information from the
10 search warrant affidavit in order to mislead the court. The Court finds that the affidavit established
11 probable cause to search the defendant's residence and DENIES the defendant's motion to suppress.
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13 **Background**

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15 The factual background of what occurred in this case is not in dispute. On December 29, 2012,
16 the defendant arrived at the Toronto Pearson International Airport (TPIA) along with his wife and his
17 mother-in-law. The defendant, a U.S. citizen, was returning from a trip on board a cruise ship that had
18 traveled from San Francisco, California to Santiago, Chile. After arriving in Santiago the defendant and
19 his traveling companions then boarded a flight to Toronto, Canada. Upon arriving at TPIA the Canadian
20 Border Services Agency (CBSA) discovered his prior criminal convictions and that he was a registered
21 sex offender in the United States. The CBSA denied the defendant's entry into Canada, although his
22 companions were allowed to enter. The defendant was sent for a secondary search where the computer
23 he was carrying was examined pursuant to Canada's border search authority. The examination revealed
24 two images on the computer of suspected minor females, at least one of which the CBSA officers
25 believed to be child pornography. Based on this information CBSA requested and received a search
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Discussion

ORDER - 3

1 defendant can show by a preponderance of the evidence that the affiant intentionally or recklessly made
2 false statements in the warrant affidavit, and can further show these statements were essential to the
3 issuing court's probable cause finding. *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978). Where facts
4 are omitted, suppression is required only if "the affidavit intentionally or recklessly omitted facts" found
5 to be material to the probable cause finding. *United States v. Ruiz*, 758 F.3d 1144, 1148 (9th Cir. 2014).
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7 The result is a two step analysis. Step one is to determine the officer's intent in omitting facts.
8 The *Franks* hearing must focus on the subjective intent of Agent Ensley in deciding what information to
9 include or omit from the affidavit, and whether the agent acted with a subjective intent to deceive the
10 magistrate judge or with reckless disregard for the truth that resulted in deception. An omission that is
11 the result of "negligence or innocent mistake" does not warrant suppression of the evidence, in the
12 absence of an otherwise deficient warrant. *Franks* 438 U.S. at 171.
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14 Step two of the analysis is an objective inquiry. If the Court finds that the officer, either
15 intentionally or in reckless disregard, omitted facts that were true in order to mislead the Court, the
16 Court then determines whether the affidavit, once corrected and supplemented, establishes probable
17 cause. If probable cause remains when the omitted material is included in the affidavit, there is no
18 constitutional violation and thus no basis to suppress. That analysis requires the Court to determine
19 whether the information contained in the four corners of the affidavit as presented to the magistrate
20 judge, augmented only with the omitted information, continues to state probable cause.
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22 **1. Agent Ensley's Testimony**

23 Agent Ensley testified at the *Franks* hearing that he has been a Special Agent with the
24 Department of Homeland Security for over five years. During his service, his career has been devoted to
25 the investigation of child exploitation cases and he has participated in approximately 200 such
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1 investigations. He has received more than three years of specialized on-the-job training and has viewed
2 hundreds of thousands of images of suspected child pornography.

3 Agent Ensley testified that he was aware, at the time he swore to the affidavit in this case, of the
4 significant differences in the definition of child pornography between Canada and the United States.
5 Because of his awareness of these differences Agent Ensley waited until he received copies of the
6 subject photos from the Canadians before he finalized his affidavit for the magistrate judge. He wanted
7 to view the images for himself and be able to accurately describe them, based on his understanding of
8 US laws, to the judicial officer. In his affidavit Agent Ensley described both images but clearly
9 indicated to the reviewing magistrate judge that, in the agent's expert opinion, only one of the two
10 images met the US federal definition of child pornography. Agent Ensley did not include the Canadian
11 authorities ultimate conclusion that neither of the two images met the Canadian definition of child
12 pornography, or that they had decided not to prosecute the defendant in Canada, because he did not feel
13 that information was relevant to the magistrate judge's review of the affidavit based on US law.
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15 The defendant seizes on this omission to argue that the agent either subjectively intended to
16 deliberately mislead the magistrate judge or that he acted in reckless disregard for the truth. Contrary to
17 the defendant's assertion, this Court is satisfied that Agent Ensley was completely truthful and forthright
18 in his testimony at the hearing. Agent Ensley was the only witness presented by either party. His
19 testimony was basically unchallenged and uncontradicted. He explained the reasons behind the
20 investigatory steps that were taken in this case and why a decision was made to continue that
21 investigation in the United States. The fact that Canada has her own laws, with very specific definitions
22 as to what constitutes child pornography has no bearing on whether those same images may or may not
23 violate US laws. To use a contrary example by way of illustration, there are many nations in the world,
24 especially in today's middle east, where possession of an image of an unclothed female, regardless of
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1 her age, would be illegal. It does not logically follow that those same images would be unlawful in the
2 United States. Agent Ensley waited to prepare his final draft of the affidavit until he had seen copies of
3 the images for himself. He has viewed hundreds of thousands of images of child pornography, and
4 understood that the images themselves were the most important factor in establishing probable cause
5 under US law. He accurately described the images in his affidavit and truthfully indicated that only one
6 of the two, in his expert opinion, met the federal definition of child pornography. The Court is satisfied
7 that Agent Ensley did not intentionally or recklessly omit material information in order to mislead the
8 magistrate judge when he presented his affidavit.

10 **2. The Omissions Were Not Material**

11 Once the Court concludes that Agent Ensley did not intentionally or recklessly omit information
12 in order to mislead the magistrate judge that ends the analysis and there is no *Franks* violation.
13 However, in the interests of complete clarity, the Court is finding now, as it did previously, that the facts
14 that were omitted in Agent Ensley's affidavit were not material in influencing the magistrate judge's
15 decision to authorize the warrant. If the complete truth about all of the omitted information, and not
16 simply the facts the defendant wants to argue, were included in the affidavit, it still would have no effect
17 on the probable cause determination. Nothing in Agent Ensley's testimony changes the Court's original
18 conclusion that a foreign agent's interpretation of foreign legal requirements, using a foreign legal
19 standard, has no materiality to a probable cause determination in the United States.

22 **3. The Affidavit States Probable Cause**

23 As with the issue of materiality, this Court had previously ruled that the affidavit as written
24 established probable cause to search the defendant's residence in the United States. Nothing in the
25 testimony presented at the *Franks* hearing changes that conclusion.
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CONCLUSION

As set out above, the Court having found that Agent Ensley did not act with the intent to mislead the magistrate judge or with reckless disregard for the fact that his actions would mislead the court, and there being ample probable cause within the affidavit, the defendant's Motion To Suppress will be DENIED.

DATED February 11, 2015.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE